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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re VERIFONE HOLDINGS, INC. SECURITIES LITIGATION This Document Relates To: ALL ACTIONS.	Master File No. 3:07-cv-06140-EMC CLASS ACTION LEAD PLAINTIFF'S RESPONSE TO THE OBJECTIONS OF JEFF M. BROWN DATE: February 14, 2014 TIME: 3:00 p.m. CTRM: The Honorable Edward M. Chen

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Lead Plaintiff National Elevator Industry Pension Fund ("Lead Plaintiff") respectfully submits this memorandum in further support of the Motion for Award of Attorneys' Fees and Expenses (Dkt. No. 322), and in opposition to the Objections of Jeff M. Brown to Proposed Settlement ("Brown Obj.") (Dkt. No. 334).

I. INTRODUCTION

In accordance with the Court's October 16, 2013 Order, a Notice of Proposed Settlement of Class Action (the "Notice") has been mailed to over 102,000 potential Class Members, posted on the Internet, and a summary notice was published in *Investor's Business Daily*, on *Business Wire*, and translated into Hebrew and published in Israel. The Notice advised that lead counsel would seek attorneys' fees not to exceed 20% of the settlement fund and expenses not to exceed $360,000. Dkt. No. 320-1.

The response from the Class has been overwhelmingly positive. Not a single institutional investor objected to any portion of the settlement or opted out. Indeed, only two objections were submitted in this matter – a stunningly low number for an action of this magnitude and the ultimate affirmation of the excellent result achieved for the Class and the reasonableness of the settlement agreement in its entirety.

This brief deals with the objection filed by Jeff M. Brown ("Brown"), a Boca Raton attorney represented by Joseph Darrell Palmer ("Palmer"), a serial objector who has been admonished, sanctioned or held in contempt by numerous courts for making frivolous objections. Moreover, Palmer is currently facing disciplinary charges by the State Bar of California for misrepresenting to various courts that he has never been the subject of disciplinary actions when, in fact, he was suspended from the bar following a felony conviction in Colorado. *See In the Matter of Joseph Darrell Palmer*, No. 125147, Case No. 12-O-16924 (State Bar Court, Los Angeles) (Exhibit A). [1]

In his objection, Brown claims to be a Class Member but failed to supply the evidence required by this Court establishing his standing to object. Indeed, when lead counsel served Brown with a deposition subpoena to try to learn more about his standing and the basis of his objection, his

[1] All exhibit references are to the Declaration of Christopher M. Wood in Support of Lead Plaintiff's Response to the Objections of Jeff M. Brown, filed herewith.

counsel flatly and improperly refused to allow the deposition. Brown's counsel threatened lead counsel with sanctions for attempting to notice the deposition, promised to appeal any adverse ruling against his client, and refused to substantively respond to lead counsel's attempts to meet and confer – perplexing behavior from someone claiming to be a Class Member with a legitimate interest in ensuring his objection is considered. Ex. B.

Brown's objection should be either stricken for failure to establish his standing or overruled in its entirety. Even if Brown could establish his standing to object, which he has not so much as attempted to do, the objections made on his behalf by Palmer border, if not squarely cross, the boundaries of frivolity. Brown's objection smacks of a desperate and vexatious attempt to extort attorneys' fees from lead counsel, who have been litigating this action vigorously for over six years, and does nothing to aid the Court in its evaluation of the proposed settlement.

For example, Brown flatly misrepresents the operation of the online calculator suggested by this Court and available to Class Members, contending it requires Class Members to release their claims to get an estimate of their recovery when it does not. Brown also claims that evaluating attorneys' fees as a percentage of the gross settlement fund is improper, ignoring controlling and unambiguous Ninth Circuit authority rejecting this same contention as long as 13 years ago and as recently as three years ago. Brown claims that lead counsel's requested fees are exorbitant without ever acknowledging or addressing the fact that the 20% fee requested is well below the Ninth Circuit's 25% benchmark and is eminently reasonable in light of the excellent results achieved on behalf of the Class. Brown's other objections are also baseless.

These type of objections add nothing to the Court's consideration of the fairness, adequacy or reasonableness of proposed settlement. As the Court in *Barnes v. FleetBoston Fin. Corp.*, No. 01-10395-NG, 2006 U.S. Dist. LEXIS 71072 (D. Mass. Aug. 22, 2006), aptly held:

> [P]rofessional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose behalf the appeal is purportedly raised, gains nothing.

Id. at *3-*4.

Accordingly, Brown's objection should be rejected by this Court, and the settlement and request for fees and expenses should be approved.

II. ARGUMENT

A. Brown Has Not Established Standing to Object

Rule 23(e)(5) of the Federal Rules of Civil Procedure provides that "[a]ny ***class member*** may object" to a proposed settlement. Fed. R. Civ. P. 23(e)(5).[2] However, "'non-class members have no standing to object,'" and the "party seeking to invoke the Court's jurisdiction – in this case, the Objectors – has the burden of establishing standing." *In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 09md2087 BTM (KSC), 2013 U.S. Dist. LEXIS 133413, at *61 (S.D. Cal. Sept. 17, 2013). Accordingly, the Notice ordered by the Court instructed that an objection must include "the number of shares of VeriFone Publicly Traded Securities purchased between August 31, 2006 and April 1, 2008, inclusive," and that any "objection must be mailed or delivered such that it is received by the following no later than December 30, 2013." Dkt. 320-1 at 17.

Brown failed to timely provide the required evidence of Class membership, and the claims administrator has not received any claim from Brown to date, although the deadline for submitting claims has not passed. Rather, Brown only states: "Objector represents to the court he is a Class Member, qualified to make a claim." Brown Obj. at 1. That is insufficient because the Notice specifically required that any objector set forth the number of VeriFone Holdings, Inc. ("VeriFone") securities purchased during the Class Period so standing to object could be determined. The Court's October 16, 2013 Order could not have been more clear:

> Any Member of the Class who does not make his, her, or its objection in the manner provided shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness or adequacy of the proposed settlement . . . or to the award of attorneys' fees . . . ."

Dkt. No. 320, ¶12.[3]

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[2] Citations and footnotes omitted and all emphasis is added unless otherwise noted.

[3] There should be no concern that Brown did not understand the Court's requirements. Brown is a founding partner at the Boca Raton, Florida litigation firm Lavalle, Brown & Ronan, P.A. and recently filed an almost identical objection in *In re Sanofi-Aventis Sec. Litig.*, No. 1:07-CV-10279-GBD (S.D.N.Y.) (Dkt. No. 273). As noted above, his attorney, Palmer, is a serial objector who is well versed in the requirements of Rule 23.

There is ample precedent that bare assertions of class membership, like Brown's here, do not establish standing. *See, e.g.*, *Knisley v. Network Assocs.*, 312 F.3d 1123, 1128 (9th Cir. 2002) ("lack of standing should be apparent" for an objector who failed to submit proof of claim); *Feder v. Elec. Data Sys. Corp.*, 248 F. App'x 579, 581 (5th Cir. 2007) ("Allowing someone to object to settlement in a class action based on this sort of weak, unsubstantiated evidence would inject a great deal of unjustified uncertainty into the settlement process."); *In re Initial Pub. Offering Sec. Litig.*, No. 21 MC 92 (SAS), 2011 U.S. Dist. LEXIS 103698, at *8-*9 (S.D.N.Y. Aug. 25, 2011) (finding unsigned, unsworn, unauthenticated tax form to be insufficient to establish class membership). Because Brown has not timely established his standing as a member of the Class, his objection should be rejected.

Moreover, Brown's failure to submit evidence of his standing should be of serious concern to the Court here because his attorney, Palmer, has a long and documented history of filing frivolous and vexatious objections on behalf of individuals who turn out ***not to be class members*** or to not know anything about the objections purportedly filed on their behalf.[4] *See In re Law Office of Jonathan E. Fortman, LLC*, No. 4:13MC00042 AGF, 2013 U.S. Dist. LEXIS 13903, at *3 (E.D. Mo. Feb. 1, 2013) ("[W]hen assessing the merits of an objection to a class action settlement, courts consider the background and intent of objectors and their counsel, particularly when indicative of a motive other than putting the interest of the class members first.").

For example, in *In re Deepwater Horizon – Appeals of the Medical Benefits Class Action Settlement*, No. 13-30221 (5th Cir.), three appellant-objectors, formerly represented by Palmer, filed a motion to dismiss their appeal on November 22, 2013, after learning that they were not in fact class members. Ex. C. In their motion to dismiss, the appellant-objectors claimed that Palmer and his co-counsel, Ted Frank ("Frank"), took "unauthorized and unapproved actions . . . during the course of their former representation," including failure to "inform the Appellants of most, if not all,

[4] Palmer's years of frivolous objections may soon be coming to end. On December 6, 2013, the State Bar of California filed disciplinary charges against Palmer for filing false declarations with numerous courts that failed to disclose his 2002 suspension from the bar following a felony conviction in Colorado. *See In the Matter of Joseph Darrell Palmer*, No. 125147, 12-O-16924 (State Bar Court, Los Angeles) (Ex. A).

significant developments and actions." *Id*. at 12-13. Palmer and Frank also failed to "apprise Appellants of ***multiple factual inaccuracies*** contained in written and verbal submissions of counsel." *Id.* at 13.

In *Hydroxycut*, 2013 U.S. Dist. LEXIS 133413, at *63-*67, before withdrawing as counsel, Palmer represented an objector who was a friend and employee of Palmer, had objected to other class-action settlements, and even recruited objectors in a case involving H&R Block by posting messages on Facebook that there was "easy money to be made here in a class action lawsuit if anyone can get me a name!!" *Id*. at *66. The court found the objector's claim that she was a class member not credible and strongly suggested that she had perjured herself in testimony to the court. *Id*. at *64. The court ultimately found that Palmer's objection "was not made in good faith" and that Palmer and his co-counsel had attempted "to pressure the parties to give him $400,000 as payment to withdraw the objections and go away" and used "the threat of questionable litigation to tie up the settlement unless the payment was made." *Id*. at *68, *71.

Unfortunately, there are many more examples of Palmer's similar and quite shocking conduct. *In re Uponor, Inc.*, No. 11-MD-2247 ADM/JJK, 2012 U.S. Dist. LEXIS 130140, at *8-*9 (D. Minn. Sept. 11, 2012) (requiring a cost bond to pursue an appeal in a case where Palmer ghost wrote objections filed by his family members, who professed to be *pro per* and were not even class members, and finding that "the Palmer Objectors have evidenced bad faith and vexatious conduct" and their actions "appear little more than dilatory tactics of questionable motivation"); *In re TFT-LCD Flat Panel Antitrust Litig*., 289 F.R.D. 548, 553-54 (N.D. Cal. 2013) (finding Palmer in contempt of court for failing to comply with a court order to produce his clients – Palmer's wife and aunt – for deposition and awarding sanctions; finding Palmer's assertions to the court during hearing "disingenuous"); *Dennis v. Kellogg Co*., No. 09-CV-1786-L (WMc), 2013 U.S. Dist. LEXIS 163118, *11-*12 n.2 (S.D. Cal. Nov. 14, 2013) ("Darrell Palmer has been widely and repeatedly criticized as a serial, professional, or otherwise vexatious objector"); *Heekin v. Anthem, Inc*., No. 1:05-cv-01908-TWP-TAB, 2013 U.S. Dist. LEXIS 26700, at *9 (S.D. Ind. Feb. 27, 2013) (finding "bad faith and vexatious conduct on the part of . . . attorney Darrell Palmer" and noting his reputation as "a serial objector").

Here, lead counsel served a deposition subpoena on Brown in order to question him about his standing, the basis of his objection and his relationship with his counsel, as has been allowed by numerous courts in this District. *In re Cathode Ray Tube Antitrust Litig.*, 281 F.R.D. 531, 533 (N.D. Cal. 2012); *In re Netflix Privacy Litig.*, No. 5:11-cv-00379-EJD, 2013 U.S. Dist. LEXIS 168298, at *6 (N.D. Cal. Nov. 25, 2013); *In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 09md2087 BTM (KSC), 2013 U.S. Dist. LEXIS 61674, at *67 (S.D. Cal. Apr. 29, 2013). True to form, Palmer refused to allow his client to appear for deposition and, when informed by lead counsel that his refusal was improper, simply responded, "Nice letter – see you at oral argument." Ex. B.

Because Brown has utterly failed to "clearly and specifically set forth facts sufficient to" establish that he has standing to object, the Court ***must*** strike his objection, as it is "powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990).

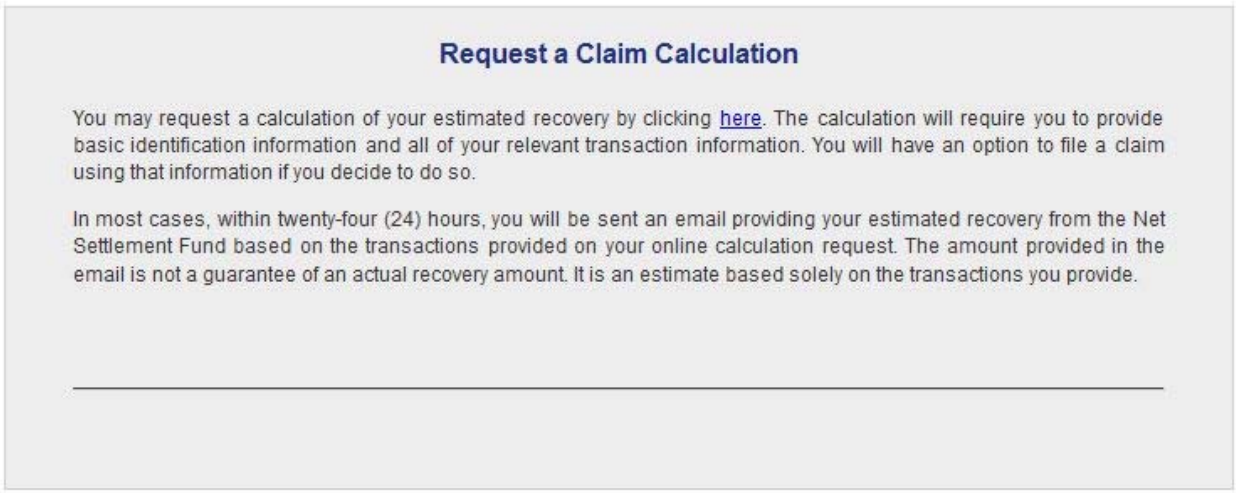
B. The Notice Approved by the Court Was More than Adequate to Meet Rule 23's Standards

The standards for notice in the Ninth Circuit are set forth in details in Lead Plaintiff's Response to the Objections of David Stern ("Stern Response"), filed herewith. As discussed therein, the Notice provided in this action was more than sufficient to comply with Rule 23. Stern Response at 21-24. Brown's specific objections are specious and should be rejected.

First, Brown claims that notice was insufficient because he only received a reminder postcard notification on December 23, 2013, and not the copy of the Notice and the Proof of Claim and Release Form (Dkt. No. 320-2) that was previously mailed to identifiable Class Members. Brown Obj. at 4. Brown's claim that he did not receive a copy of the Notice and Proof of Claim and Release Form is not credible, as it was mailed to him on November 18, 2013, after he was identified as a potential Class Member by his broker. *See* Declaration of Carole K. Sylvester Re Status of Notification Efforts (filed herewith), ¶12. Further, as set forth in this Court's order preliminarily approving settlement and providing for notice, the reminder notice was only sent to Class Members who had not responded to the mailed notice. Dkt. No. 320 at ¶6(d). The fact that Brown received a copy of the Court-ordered reminder notice postcard, and therefore had actual notice of the

settlement, including the due date for claims and the settlement website where additional information was available, is evidence of the fulsome notice program in this case and is proof of the adequacy, rather than the lack, of notice.

Second, Brown contends that the settlement calculator available on the claims administrator's website is a "a cleverly designed deceptive device aimed at securing releases from unsuspecting Class Members" and suggests that use of the calculator requires Class Members to release their claims against defendants. Brown Obj. at 4-5. This assertion is patently false. The Gilardi website clearly states that potential Class Members can "request a calculation of your estimated recovery" separately from filing a claim without agreeing to any release. When a person clicks the "Request a Claim Calculation" option, the following page appears, on which it is stated that a calculation will require the person to provide basic identification information and all relevant transaction information:

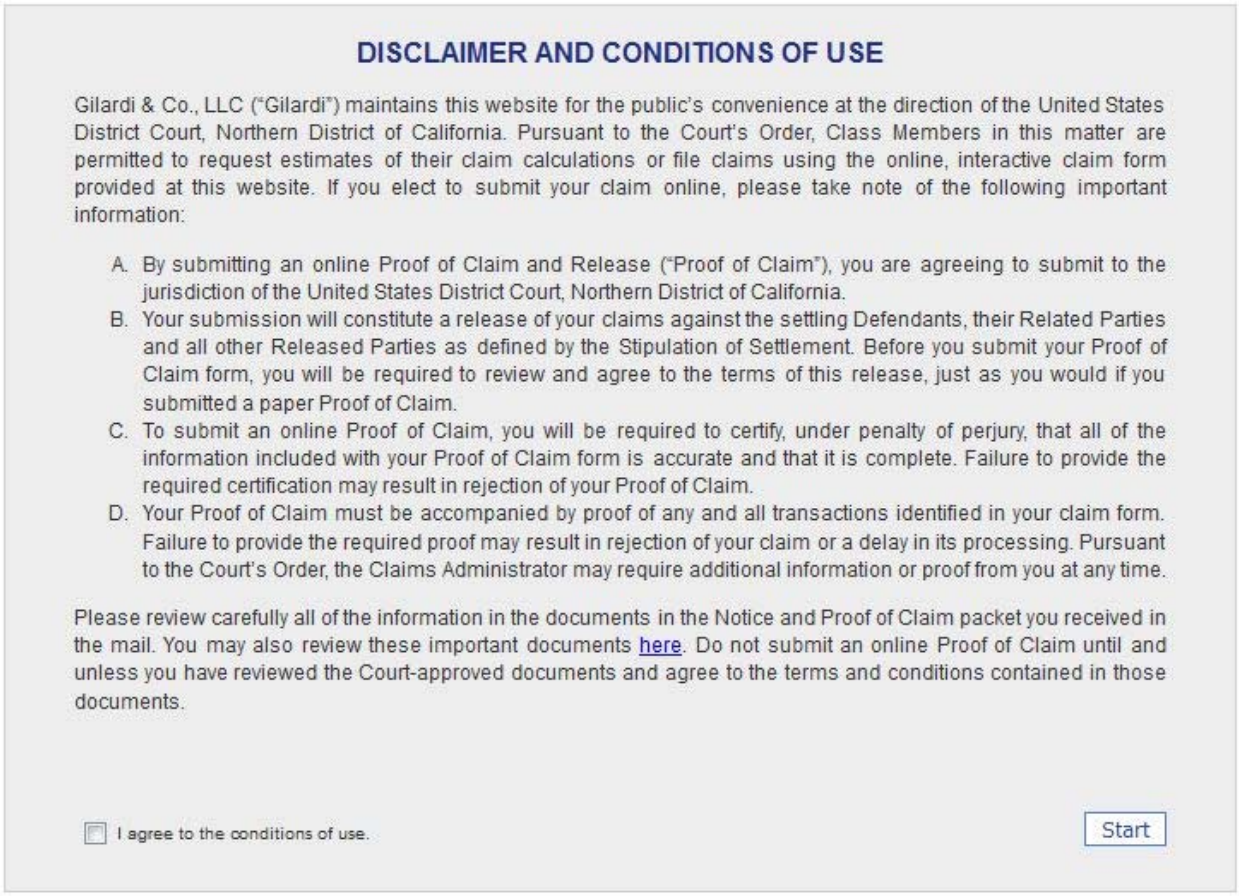


Request a Claim Calculation

You may request a calculation of your estimated recovery by clicking here. The calculation will require you to provide basic identification information and all of your relevant transaction information. You will have an option to file a claim using that information if you decide to do so.

In most cases, within twenty-four (24) hours, you will be sent an email providing your estimated recovery from the Net Settlement Fund based on the transactions provided on your online calculation request. The amount provided in the email is not a guarantee of an actual recovery amount. It is an estimate based solely on the transactions you provide.

After checking "here" to proceed to the next page and request a calculation, the following page appears, on which it is stated that class members are permitted to: (i) request estimates of their claims calculations; or (ii) file an actual claim. It is clearly stated that class members are only agreeing to a release if they submit a claim, not if they request an estimate of their claim:



DISCLAIMER AND CONDITIONS OF USE

Gilardi & Co., LLC ("Gilardi") maintains this website for the public's convenience at the direction of the United States District Court, Northern District of California. Pursuant to the Court's Order, Class Members in this matter are permitted to request estimates of their claim calculations or file claims using the online, interactive claim form provided at this website. If you elect to submit your claim online, please take note of the following important information:

A. By submitting an online Proof of Claim and Release ("Proof of Claim"), you are agreeing to submit to the jurisdiction of the United States District Court, Northern District of California.
B. Your submission will constitute a release of your claims against the settling Defendants, their Related Parties and all other Released Parties as defined by the Stipulation of Settlement. Before you submit your Proof of Claim form, you will be required to review and agree to the terms of this release, just as you would if you submitted a paper Proof of Claim.
C. To submit an online Proof of Claim, you will be required to certify, under penalty of perjury, that all of the information included with your Proof of Claim form is accurate and that it is complete. Failure to provide the required certification may result in rejection of your Proof of Claim.
D. Your Proof of Claim must be accompanied by proof of any and all transactions identified in your claim form. Failure to provide the required proof may result in rejection of your claim or a delay in its processing. Pursuant to the Court's Order, the Claims Administrator may require additional information or proof from you at any time.

Please review carefully all of the information in the documents in the Notice and Proof of Claim packet you received in the mail. You may also review these important documents here. Do not submit an online Proof of Claim until and unless you have reviewed the Court-approved documents and agree to the terms and conditions contained in those documents.

I agree to the conditions of use.

Start

Thus, contrary to Brown's contention, the "Disclaimer and Conditions of Use" do not require potential class members to give up ***any rights or provide any releases whatsoever*** in order to request a calculation of their potential recovery. Rather, in language that Brown intentionally omitted from his objection, the conditions of use remind potential class members that "***[i]f you elect to submit your claim online***, please take note of the following important information," including the fact that submission of a claim subjects class members to the jurisdiction of the court and constitutes a release of a class member's claims. Because the website allows potential class members to convert their estimate into a claim to streamline the claims process and minimize the burden on class members, this clear language reminding class members of the effect of submitting a claim is both prudent and entirely appropriate.

C. The Requested Fees Are Reasonable and Below the Ninth Circuit Benchmark

1. The Requested Fees Are Proper Under the PSLRA and Are Appropriately Calculated as a Percentage of the Gross Settlement

Brown argues that attorneys' fees can only be calculated after expenses have been deducted – that the percentage of fees should be based on the net recovery, rather than the gross recovery – and that any other method of calculating fees violates the Private Securities Litigation Reform Act of 1995 ("PSLRA"). Brown Obj. at 5. This contention was expressly rejected by the Ninth Circuit in identical circumstances over 13 years ago. *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000).

In *Powers*, an objector to a class action settlement contended that "the district court erred by awarding attorneys' fees calculated on a percentage of the gross recovery rather than a percentage of the recovery minus expenses." *Id*. The Ninth Circuit disagreed, holding that the PSLRA "does not mandate a particular approach to determining fees. . . . It simply requires that the fees and expenses ultimately awarded be reasonable in relation to what the plaintiffs recovered." *Id.* "[T]he choice of whether to base an attorneys' fee award on either net or gross recovery should not make a difference so long as the end result is reasonable." *Id*. The Ninth Circuit's holding in *Powers* remains black-letter law to this day. *Palmer v. Nigaglioni*, 508 F. App'x 658 (9th Cir. 2013) (holding that the "district court did not abuse its discretion in approving an attorney's fees award in the sum of 28% of the ***gross*** common fund recovery") (citing *Powers*, 229 F.3d at 1258). Brown's objection on this basis, and his failure to bring *Powers* to the Court's attention, is inexplicable.

In any event, the fee requested by lead counsel is reasonable in relation to the recovery, whether it is calculated on the gross amount of the settlement ($95 million) or net of expenses ($94.7 million) because, either way, it is significantly ***less*** than the 25% benchmark in this Circuit. Dkt. No. 322 at 8, 16-17. Lead counsel's fee request, 20% of the gross settlement fund, represents 20.06% of the net settlement fund; and courts routinely award fees of 25% or more in similar common-fund cases and routinely calculate fees based on a percentage of the total gross recovery. *Id.*; *see also In re Flag Telecom Holdings*, No. 02-CV-3400 (CM) (PED), 2010 U.S. Dist. LEXIS 119702, at *66-*67 (S.D.N.Y. Nov. 8, 2010) ("Courts in this District and throughout the nation . . . have not

hesitated to award 30% of the 'gross' recovery, or more, in complicated securities fraud cases such as this."); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 172 n.8 (3d Cir. 2006) (rejecting objection that attorneys' fees must be calculated based on net settlement amount and noting "[e]xpenses are generally considered and reimbursed separately from attorneys' fees").

2. The Requested Attorneys' Fees Are Presumptively Reasonable Because the Fee Was Agreed to by Lead Plaintiff and Lead Counsel

As set forth in Lead Plaintiff's Motion for Award of Attorneys' Fees and Expenses, "'courts should afford a presumption of reasonableness to fee requests submitted pursuant to an agreement between a properly-selected lead plaintiff and properly-selected lead counsel.'" Dkt. No. 322 at 6 (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 220 (3d Cir. 2001)). Brown acknowledges that negotiated fee agreements are afforded a presumption of reasonableness but contends the presumption matters little in the face of a misleading and excessive claim. Brown Obj. at 6. As explained below, none of Brown's contentions regarding the requested fee justify departure from this presumption, particularly not where the fee agreement results in a fee that is ***lower*** than the benchmark fee in the Ninth Circuit.

3. The Requested Fees Are Appropriate Given the Result Achieved and the Significant Risks Involved in Prosecuting the Case

While completely ignoring the extensive discussions of the results achieved and the specific risks involved in prosecuting this action (Dkt. No. 309 at 14-22; Dkt. No. 323 at ¶¶88-107), Brown contends that there was, in fact, little risk in prosecuting the action because "the vast majority of PSLRA cases that are certified as class actions and not dismissed on motions to dismiss or summary judgment are terminated by settlement." Brown Obj. at 7.

As an initial matter, Brown's contention is irrelevant because ***no class*** had been certified in this action when the parties agreed to settle the case, and Lead Plaintiff had not prevailed on summary judgment. Particularly in light of the potential for changing law with respect to class certification, it was anything but certain that Lead Plaintiff would prevail past the summary judgment stage. Dkt. No. 323 at ¶¶88-107.

Brown's contention also suffers from both hindsight bias and, remarkably, foresight bias. When lead counsel began prosecuting this action, there was no guarantee that a successful settlement would be reached; yet lead counsel expended significant time, effort and out-of-pocket expenses pursuing the Class' claims. Dkt. No. 322 at 10-12. Indeed, the action was dismissed with prejudice by the District Court, as are one-third to one-half of all modern-day securities class actions, prior to lead counsel's appeal and reversal of the District Court's order.

Further, after a successful result, there will always be Monday-morning quarterbacks like Brown suggesting that the risk of no recovery was low from the start and a smaller-percentage attorneys' fee is fair. The Court should not be persuaded to use such hindsight bias to determine a fair and reasonable fee. "Learning how the story ends makes the outcome seem inevitable and predictable, thereby distorting our perception of what could have been predicted." Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. Chi. L. Rev. 571, 571 (1998). To prove this theory, over 100 federal magistrate judges were given a statement describing a case in which a prisoner appealed after being sanctioned by a trial judge for filing a frivolous complaint. The judges were given one of three different outcomes and then asked to identify the result that was most likely to occur. To no one's surprise, the judges' estimates of the most likely outcome depended on what they were told about the actual outcome. "[T]he judges exhibited a predictable hindsight bias." Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 803 (2001).

4. The SEC Did Much More to Hurt Lead Plaintiff's Case than to Help It

Brown next complains that lead counsel did not expend substantial efforts in this action because "much of the hard investigative work was done by the S.E.C." Brown Obj. at 7. Once again, Brown's objection is not grounded in reality. As set forth in the opening brief, the U.S. Securities and Exchange Commission's ("SEC") failure to bring ***any*** fraud charges against ***anyone*** at VeriFone was a justification used to ***dismiss*** the action by the District Court; and defendants repeatedly cited the SEC's conclusions as evidence supporting dismissal. Dkt. No. 321 at 13; *In re Verifone Holdings Sec. Litig.*, No. C 07-6140 MHP, 2011 U.S. Dist. LEXIS 24964, at *29 (N.D. Cal.

Mar. 7, 2011) ("the SEC's decision not to plead scienter hurts plaintiffs' ability to plead a strong inference of scienter in this private action"), *aff'd in part and rev'd in part*, 704 F.3d 694 (9th Cir. 2012). In fact, lead counsel was so incensed by the SEC's actions that Lead Counsel publicly called out the SEC's regional chief at the time, Marc Fagel, for his inaction in VeriFone, calling him "irresponsible" and questioning the agency's commitment to investor protection. Patrick Coughlin, "The New SEC: Is It An Improvement?," *The Daily Journal* (Sept. 21, 2009) (Ex. D). These are hardly the actions of counsel expecting a free ride from government regulators in proving their claims.

Far from assisting plaintiffs in alleging their securities fraud claims, Lead Counsel's success was achieved ***in spite*** of the SEC's discretionary determination not to bring any fraud charges against defendants, which almost gutted the entire action. Shortly after the SEC announced its settlement with VeriFone in September 2009, the parties participated in a mediation. Defendants believed the settlement value of the case was extremely low given the SEC's failure to sue VeriFone for fraud after conducting an exhaustive investigation, and the parties were unable to resolve the case. Dkt. No. 323 at ¶¶41-43. Lead Plaintiff believed the case could have been settled for a portion of the approximately $40 million of then-existing directors' and officers' liability insurance but was unwilling to settle the case for such an amount and instead chose to continue litigating the case. *Id.* at ¶43.

On March 8, 2011, this Court issued an order dismissing the case with prejudice and noted the SEC's failure to bring fraud charges against the defendants as one of the facts supporting the dismissal. Dkt. No. 275; *Verifone*, 2011 U.S. Dist. LEXIS 24964, at *28-*29; Dkt. No. 323 at ¶53. Lead Plaintiff and lead counsel successfully appealed the District Court's dismissal of this case, and defendants again argued in their appellate briefs that the SEC's failure to bring fraud charges against them supported affirmance of the dismissal. Dkt. No. 323 at ¶56.

After successfully appealing the District Court's dismissal of the case, Lead Plaintiff and lead counsel served document requests on defendants and various third parties. Dkt. No. 323 at ¶¶62-72. Lead Plaintiff and lead counsel received and reviewed well over 300,000 pages of documents, including the documents VeriFone provided to the SEC and other documents. *Id.* at ¶73. Many of

those documents were used as evidence during the March 26, 2013 mediation. *Id*. at ¶¶74-79. Lead Plaintiff and lead counsel believed the evidence was sufficient to prove defendants knowingly or recklessly made materially false and misleading statements. Although Lead Plaintiff and lead counsel believed the evidence supported their claims, they also understood that some of the evidence, especially defendant Paul Periolat's apparent acceptance of responsibility and lack of a clear line from him establishing knowledge of the other defendants, could be cited by defendants in support of their assertions that they did not knowingly or recklessly make materially false and misleading statements. *Id*. at ¶¶81-107.

In short, Brown's contention that lead counsel did not expend substantial efforts because much of the investigative work was done by the SEC is wrong and ignores that lead counsel expended substantial effort to show that the evidence was sufficient to prove defendants knowingly or recklessly made materially false and misleading statements despite the SEC's failure to bring fraud charges against defendants.

Brown's claim that Class counsel did not expend adequate efforts on behalf of the Class to justify the requested fee is a routine objection made by his counsel and is just as routinely rejected. *City of Roseville Emps. Ret. Sys. v. Orloff Fam Tr. UAD 12/31/01*, 484 F. App'x 138, 141 (9th Cir. 2012) (rejecting Palmer's contention that the district court awarded an excessive 25% fee because plaintiffs could simply "ride the Government's coattails to victory"); *In re TFT-LCD (Flat Panel) Antitrust Litig*., No. M 07-1827 SI, 2013 U.S. Dist. LEXIS 49885, 74 (N.D. Cal. Apr. 1, 2013) (rejecting Palmer's contention that a 28.6% fee was inappropriate in an antitrust case where "defendants' liability had effectively been established").

This said, it clearly misses the point here. Counsel for the Class far exceeded the SEC's efforts and the results speak for themselves. The SEC recovered a $25,000 penalty while counsel for the Class recovered $95 million. *See Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 55 (2d Cir. 2000) ("the quality of representation is best measured by the results").

5. The Hourly Rates, Expenses and Lodestar Are Reasonable

Brown's contention that Class counsel's hourly billing and lodestar calculations are excessive do not withstand scrutiny. Brown Obj. at 7-8. As an initial matter, Brown's fixation with the

lodestar submission is unwarranted. While lodestar data can certainly be considered, district courts in this Circuit have almost uniformly shifted to the percentage method in awarding fees in common-fund representative actions; and here, the percentage sought is lower than the Ninth Circuit benchmark. Dkt. No. 322 at 5-6. That is consistent with the PSLRA, which states that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable ***percentage*** of the" settlement. 15 U.S.C. §78u-4(a)(6) (emphasis added). Brown simply ignores that lead counsel is not asking to be compensated based on their lodestar; it is merely to serve as a cross-check.[5] Dkt. No. 322 at 18-19.

Indeed, the reason that courts and commentators have routinely encouraged a percentage fee in common-fund cases is precisely to avoid the burdens and perverse incentives that can be associated with lodestar calculations. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) ("Because the benefit to the class is easily quantified in common-fund settlements, we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar."); *Manual for Complex Litigation*, §14.121, Federal Judicial Center (4th ed. 2004) ("In practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, . . . capable of manipulation . . . [and] creates inherent incentive to prolong the litigation.").

Nevertheless, turning to the lodestar data, Brown notes the hourly rates used by lead counsel but fails to identify any of Class counsel's hourly rates that are inconsistent with standard rates charged in this market. Similarly, there is nothing improper about the amount of time devoted to this litigation by lead counsel's partners. If anything, one would think that Brown would be glad to see that some of lead counsel's most senior partners and attorneys, including some of the most experienced and respected securities litigators in this Circuit, devoted huge amounts of their time, skill and attention to securing the result achieved here.

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[5] In contrast to the use of the lodestar method as a primary tool for setting a fee award, the lodestar cross-check is performed with a less exhaustive cataloguing and review of counsel's hours. *See In re Rite Aid Corp. Sec Litig.*, 396 F.3d 294, 306 (3d Cir. 2005) ("The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting."); *Goldberger*, 209 F.3d at 50 ("Of course, where [the lodestar method is] used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized . . . .").

Brown also criticizes lead counsel for the work of Cody LeJeune, claiming that he made an appearance after the settlement agreement had already been agreed to. Brown Obj. at 8.[6] The timing of Mr. LeJeune's notice of appearance is not surprising, as Mr. LeJeune currently works in lead counsel's settlement department, where he focuses on obtaining court approval of settlements in securities fraud class action cases. Accordingly, Mr. LeJeune routinely begins to work on cases at the time of settlement, having submitted *pro hac vice* applications at or around the time of settlement in at least eight cases in the last two years.[7]

Nor is lead counsel's lodestar multiplier unreasonable. The multiplier requested here, 4.3, is not unreasonable in light of the results achieved and this Circuit's precedent. Dkt. No. 322 at 18-19; *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998) ("'multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied'") (quoting 3 Newberg §14.03 at 14-5); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995) ("Multipliers in the 3-4 range are common in lodestar awards for lengthy and complex class action litigation.").

6. By All Objective Measures, Class Counsel Achieved an Excellent Result

Brown claims that the result achieved by lead counsel "seems woefully inadequate." Brown Obj. at 9. Yet Brown ignores, and makes no effort whatsoever to address, the detailed explanation provided to the Court that sets forth the specific risks of this litigation, including the serious risk of non-payment if a judgment was entered, as well as the benefit of achieving a more immediate and certain recovery for the Class. *See* Dkt. No. 309 at 14-22; Dkt. No. 323 at ¶¶88-107.

[6] On January 15, 2014, lead counsel received a refund of $305 relating to a fee to admit Mr. Lejeune to this Court. Therefore, lead counsel reduced the amount of expenses requested to be reimbursed from $278,994.44 to $278,689.44.

[7] *In re MBIA Inc. Sec. Litig.*, No. 05-CV-03514 (LLS) (S.D.N.Y. Dec. 10, 2012), Dkt. No. 127; *City of Roseville Employees' Ret. Sys. v. Energysolutions, Inc.*, No. 1:09-cv-08633-JGK (S.D.N.Y. Dec. 19, 2012), Dkt. No. 96; *Plumbers & Pipefitters Local Union No. 630 Pension-Annuity Trust Fund v. Northwest Pipe Co.*, No. 3:09-cv-05724-RBL (W.D. Wash. Dec. 17, 2012), Dkt. No. 90; *In re Constar Int'l Inc. Sec. Litig.*, No. 03cv05020 (E.D. Pa. Dec. 19, 2012). Dkt. No. 329; *Luman v. Anderson*, No. 4:08-cv-00514-C-W-HFS (W.D. Mo. Feb. 22, 2013), Dkt. No. 146; *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, No. 08-cv-10446 (D. Mass. July 23, 2013), Dkt. No. 186; *Wong v. Accretive Health, Inc.*, No. 1:12-cv-03102 (N.D. Ill. Sept. 30, 2013), Dkt. No. 68; *Buettgen v. Harless*, No. 3:09-cv-00791-K (N.D. Tex. Oct. 22, 2013), Dkt. No. 241.

Moreover, Brown ignores the fact that by any objective measure, the settlement achieved is exceptional. Assuming lead counsel were able to prevail on every claim asserted, the $95 million settlement represents approximately 10.4%-16.4% of the Class' maximum estimated damages after trial. Dkt. No. 322 at 9. This rate of recovery is many times larger than the median settlement value of actions with damages of between $500 million and $4.9 billion in 2012 (1.1%-1.4%).[8] *Id*. In addition, according to the National Economics Research Associates ("NERA"), which tracks and reports on securities class actions, including securities settlements, over the period 1996-2012, the average settlement was between $8 and $42 million;[9] and the median settlement for the same time period was between $3.7 million and $12 million. NERA 2012 Review at 26 (Figure 24) and 28 (Figure 26), *available at* http://www.nera.com/67_7992.htm.

D. The Timing of Payment of Attorneys' Fees Is Entirely Proper

As set forth in Lead Plaintiffs' Response to the Objections of David Stern, the timing of the payment of attorneys' fees is a standard term approved by courts all over the country and is entirely proper. Stern Response at 19-21.

[8] *See* Cornerstone Research Report, entitled *Securities Class Action Settlements: 2012 Review & Analysis*, at 8 (Figure 8). For a more detailed explanation of the damages in this litigation, the Court is respectfully referred to Lead Plaintiff's Response to the Court's September 5, 2013 Order Re Supplemental Briefing at 9-13 (Dkt. No. 309).

[9] "The average calculation excludes settlements above $1 billion, settlements in IPO laddering cases, and settlements in merger objection cases. The settlements over $1 billion have a large impact on averages, while the IPO laddering cases and merger objection cases are atypical; inclusion of any of these may obscure trends in more usual cases." Dr. Renzo Comolli, Sukaina Klein, Dr. Ronald I. Miller, and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review* at 26 (NERA Jan. 29, 2013) ("NERA 2012 Review").

III. CONCLUSION

For the foregoing reasons, lead counsel respectfully submits that Brown's objection should be stricken for failure to establish his standing or, in the alternative, overruled.

DATED: January 16, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2014, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 16, 2014.

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